

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs September 22, 2009

STATE OF TENNESSEE v. RODERICK DEAN HUGHES

Appeal from the Circuit Court for Blount County
No. C-14289 David R. Duggan, Judge

No. E2009-00649-CCA-R3-CD - Filed November 12, 2009

The defendant, Roderick Dean Hughes, appeals from the Blount County Circuit Court's revocation of his probation and order of incarceration. Discerning no error, we affirm the judgment of the trial court.

Tenn. R. App. P. 3; Judgment of the Circuit Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER, J., joined. D. KELLY THOMAS, JR., J., not participating.

J. Liddell Kirk, Knoxville, Tennessee (on appeal), and Mack Garner, District Public Defender (at hearing), for the appellant, Roderick Dean Hughes.

Robert E. Cooper, Jr., Attorney General and Reporter; Clark B. Thornton, Assistant Attorney General; Michael Flynn, District Attorney General; and Stephen Ogle, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The defendant pleaded guilty to the offense of hindering a secured creditor, *see* T.C.A. § 39-14-116 (1997), a Class E felony, on September 3, 2003. The trial court ordered that the defendant serve a two-year, suspended sentence and ordered that the defendant pay restitution of \$11,284.88. The defendant's probationary conditions required him to make monthly payments toward court costs and restitution. Based on the State's claim that the defendant violated his probation by failing to pay costs and restitution, the trial court revoked the defendant's probation but again placed him on probation subject to determinate release on February 24, 2005. *See* T.C.A. § 40-35-501(a)(3) (2003). The defendant's probation was then transferred to his home state of Indiana. In September 2005 and January 2006, respectively, two determinate release violation reports alleged that the defendant failed to abide by the terms of his probation by failing to pay costs and restitution.

The defendant was convicted of failure to pay child support in Indiana on June 30, 2006. The Indiana trial court sentenced the defendant to eight years' incarceration with three years

suspended to probation, then a third Tennessee determinate release violation report issued citing the defendant's Indiana conviction as a violation of probation. After the defendant was released from incarceration in Indiana in January 2009, he was extradited to Tennessee to determine whether to revoke his probation based upon the determinate release violation reports.

During the March 10, 2009 probation revocation hearing, the State referenced the reports alleging that the defendant violated the terms of his probation by committing a subsequent criminal offense and failing to pay costs and restitution. The State also introduced a copy of the judgment from Indiana convicting the defendant of failure to pay child support and sentencing him to eight years' incarceration with three years suspended.

The defendant testified that he was a 42-year-old college graduate who lived in Connersville, Indiana. He testified that he had two sons who were 18 and 20 years old, respectively. The defendant explained that he had an agreement to pay his former wife's mortgage in lieu of child support. He said, "They put me on back child support, \$17,000 behind in '98. I was supposed to pay on the arrearage at \$50 a week." He testified that he paid until 2004, when he "violated . . . and . . . got behind an extra five or six thousand." He maintained that he formerly worked as an insurance manager, but because of his Tennessee felony conviction, he lost his license for three years.

The defendant explained his Tennessee conviction, stating that he owned a business in Tennessee and that a forklift was stolen from his lot. He claimed that he "took a Class E felony on a hindering secured creditors on a forklift." He received a sentence of two years' probation, and the probation was transferred to Indiana, his home state. He stated that the trial court found that he violated his probation in 2004 due to his failure to timely pay restitution and fees "[b]ecause [he] lost [his] career with a felony. And [he] was going from job to job." He testified that he had difficulty finding employment that suited the "certain amount of living" to which he was accustomed and that caused him to fall behind on his child support payments. He testified that he posted bond in Tennessee for the alleged 2006 probation violation and that he returned to Indiana to face prosecution due to his failure to pay child support.

The defendant testified that he "got [his] life back together" and "got [his] license back." He then pleaded guilty to failure to pay child support in Indiana and received a sentence of eight years' with three years on probation. He testified that he went to jail in June 2006 and that he "got out on good behavior" on January 9, 2009; the defendant said, however, that he was extradited to Tennessee upon his release from Indiana. He stated that he informed his probation officer, the prosecutor, and the trial judge regarding his inability to make his Tennessee court date for probation violation in August 2006 due to his incarceration in Indiana.

The defendant testified that, at the time of the hearing, he was engaged to a woman with "a good job, good life" but that his subsequent incarceration in Tennessee caused them to delay the wedding. He stated that he also expected to have "pretty good . . . employment opportunities" when he returned to Connersville, Indiana. He explained that he held a current license to broker home, automobile, life, health, and disability insurance. He explained that he would have to continue paying child support after his release and that he owed approximately \$35,000. He

estimated that, despite his child support payments, he could pay \$250 or \$300 per month toward the approximately \$11,000 in restitution he owed for his Tennessee crime. He mentioned that he would not owe any vehicle payments or house payments because of his fiancée. He maintained that he had no substance abuse problems.

At the close of proof, defense counsel admitted that the defendant violated the terms of his probation because of his Indiana conviction. He argued that the court should “flatten” the defendant’s sentence by giving the defendant jail credit on his Tennessee conviction for the time he served in Indiana. Counsel argued that, because the trial court had issued a warrant for the defendant’s alleged probation violations while he was in prison in Indiana, the trial court should consider his Indiana jail time as pretrial time served. In the alternative, defense counsel suggested that the court “sentence [the defendant] to the time he has served in the Tennessee jail [and] extend the probation for up to two years.”

The trial court found that the defendant materially violated the terms of his probation by failing to pay costs and restitution and by committing violations of criminal law in Indiana. The court ordered that the defendant serve his two-year sentence, but it provided jail credit for any time served in Tennessee and related to the case at hand. The trial court filed an order revoking the defendant’s probation on March 13, 2009, and the defendant filed a timely appeal on March 23, 2009.

The defendant argues on appeal that the trial court abused its discretion in revoking his probation. He argues, “[T]here were basically two allegations of violation. One was that defendant failed to pay restitution from the time of his being placed on determinate release in 2005 to the time of the violation warrant of January 2006.” The defendant noted that the second violation was committing the criminal offense of failing to pay child support in Indiana. He argues that “[b]oth these issues are a matter of money.” The defendant posits that because *State v. Dye*, 715 S.W.2d 36 (Tenn. 1986), requires that, in revoking probation, a trial court must find that a defendant’s failure to pay restitution was “willful,” the trial court abused its discretion in revoking the defendant’s probation without explicitly finding that his failure to pay was willful. The State disagrees.

Upon a finding by a preponderance of the evidence that the defendant has violated the conditions of probation, the trial court may revoke the defendant’s probation and “cause the defendant to commence the execution of the judgment as originally entered, or otherwise in accordance with § 40-35-310.” T.C.A. § 40-35-311(e) (1997); *see also Stamps v. State*, 614 S.W.2d 71, 73 (Tenn. Crim. App. 1980). Following a revocation, “the original judgment so rendered by the trial judge shall be in full force and effect from the date of the revocation of such suspension.” *Id.* § 40-35-310. The revoking court may extend the period of probation supervision for a period not to exceed two years. *Id.* § 40-35-308(c).

The decision to revoke probation rests within the sound discretion of the trial court, and this court will not disturb the trial court’s ruling in the absence of a showing that the trial court abused that discretion. *State v. Shaffer*, 45 S.W.3d 553, 554 (Tenn. 2001) (citing *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991)). The trial court also retains the discretionary authority to order the

defendant to serve the original sentence. *See State v. Duke*, 902 S.W.2d 424, 427 (Tenn. Crim. App. 1995). To establish an abuse of discretion, the defendant must show “that the record contains no substantial evidence to support the conclusion of the trial judge that a violation of the conditions of probation has occurred.” *Harkins*, 811 S.W.2d at 82 (citing *State v. Grear*, 568 S.W.2d 285, 286 (Tenn. 1978)); *State v. Delp*, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980)). Relief will be granted only when “the trial court’s logic and reasoning was improper when viewed in light of the factual circumstances and relevant legal principles involved.” *Shaffer*, 45 S.W.3d at 555 (quoting *State v. Moore*, 6 S.W.3d 235, 242 (Tenn. 1999)).

When the basis for revocation of a probationary sentence is failure to pay costs and fines, a court may not revoke the sentence until determining the underlying reasons why the payment has not been made. *Dye*, 715 S.W.2d at 40; *Massey v. State*, 929 S.W.2d 399, 402 (Tenn. Crim. App. 1996) (citing *Bearden v. Georgia*, 461 U.S. 660, 193 S. Ct. 2064 (1983)). If the nonpayment is due to willful refusal to pay or failure to make sufficient bona fide efforts to obtain the means to pay, then probation may be revoked. *Dye*, 715 S.W.2d at 40. If, on the other hand, the nonpayment stems from the probationer’s inability to pay, it may not form the basis for imprisonment unless alternative measures other than incarceration are inadequate to meet the state’s needs in punishment and deterrence. *Id.* However, we note that when an independent and proper basis exists aside from the defendant’s failure to pay restitution, we will uphold the trial court’s revocation of probation. *See State v. Daryl McKinley Robinson*, No. W1999-01386-CCA-R3-CD, slip op. at 3 (Tenn. Crim. App., Jackson, May 4, 2000).

The trial court’s findings regarding the defendant’s payment of restitution are as follows,

Now, with respect to [the defendant] not paying restitution and costs, I understand that he couldn’t pay anything while he was incarcerated in Indiana. But I think this record clearly established that he was not paying on his costs and he was not paying on his restitution even before he was convicted of a crime in Indiana.

The defendant argues this consideration does not reflect a “willful” failure to pay restitution, and the State argues that the court made “an implicit finding that the nonpayment was by the defendant’s own choice.” We agree with that State that the trial court’s findings show that the court determined that the defendant willfully avoided payment of restitution well before he was incarcerated in Indiana. However, we note that evidence also clearly supported that the defendant broke the laws of Indiana against the terms of his probation. Further, defense counsel admitted on the record that this was a violation. In light of the record, we cannot say the trial court abused its discretion in revoking the defendant’s probation.

For the above-stated reasons, we affirm the judgment of the trial court.

JAMES CURWOOD WITT, JR., JUDGE